IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

R.S.A.No.1696 of 1999
Date of Decision : 03.12.2007

Diwan Chand .....Appellant

versus

Kuldip Kumar Mehta .....Respondent

CORAM : HON'BLE MR.JUSTICE HEMANT GUPTA

Present : Mr.N.K.Joshi, Advocate for the appellant.
Mr.G.S.Sandhawalia, Advocate for the respondent.

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JUDGMENT

HEMANT GUPTA, J. (Oral)

The defendant is in second appeal aggrieved against the judgment and decree passed by the Courts below whereby suit of the plaintiff for specific performance of the agreement to sell dated 3.6.1995 stands decreed.

The plaintiff-respondent filed a suit for specific performance of the agreement of sale dated 3.6.1995 in respect of the property measuring 1¼ marls agreed to be sold by the defendant for a sum of Rs.1,87,000/-. It is the case of the plaintiff that a sum of Rs.51,000/- was paid as earnest money to the defendant and the sale deed was to be executed on payment of balance sale consideration on 5.10.1995. Since the defendant failed to execute the sale deed, even though the plaintiff remained present in the office of the Sub Registrar on the aforesaid date, the plaintiff filed the

present suit for specific performance of the agreement of sale after giving another opportunity to the defendant to get the sale deed executed.

The defendant, in the written statement, denied the allegations taking preliminary objections that the alleged agreement is a result of fraud and misrepresentation. In para 12 of the written statement, the defendant has pleaded that the plaintiff is tenant of two shops @ Rs.400/- per month rent of each shop and that the plaintiff has not paid the rent for the last three years, denying the rate of rate of rent as Rs.500/- per month as pleaded by the plaintiff.

After considering the evidence led by the parties, both the Courts below have decreed the suit. The learned trial Court found that the agreement was scribed by regular scribe. PW-3 Milkhi Ram is the attesting witness. Plaintiff also examined PW-4 Santosh Sehgal who identified the signatures of Sub Registrar on Exhibit P-4. PW-1 Paramjit Singh and PW-5 H.K.Seth are the witnesses to prove the ready and willingness of the plaintiff to seek execution of the sale deed and the pay orders prepared for the payment of the balance sale consideration. The plaintiff himself examined as PW-2. Whereas the defendant appeared himself as DW-1. The learned trial Court found that a perusal of the agreement Exhibit P-3, shows that the signatures of the defendant are appended on it alongwith the signatures of Pardeep Kumar, Jatinder Veer and Comrade Milkhi Ram. The defendant has admitted his signatures on Exhibit P-3 at the points A & B and that he knows Comrade Milkhi Ram. The Court found that the defendant has not lodged any complaint in respect of execution of the agreement. Only DDR No.9 dated 19.11.1995, Mark-A, has been produced.

The subject matter of such DDR is not for obtaining the signatures by the plaintiff, but it is in respect of complaint that Kuldip Kumar, Babu and Saroj Kumari called bad names to the defendant and were to beat him. Thus, the Court found that the agreement of sale is proved to be executed and granted a decree for specific performance in favour of the plaintiff. The learned First Appellate Court affirmed the findings recorded by the learned trial Court, although it recorded finding that the defendant has admitted his signatures in the cross examination on the agreement of sale Exhibit P-3 and that he has received earnest money in the sum of Rs.51,000/-.

The learned counsel for the appellant has vehemently argued that the finding recorded by the learned First Appellate Court is based on misreading of evidence as the defendant has neither admitted his signatures on the agreement Exhibit P-3 nor admitted the receipt of Rs.51,000/- as earnest money. Therefore, the finding recorded by the learned First Appellate Court suffers from misreading of evidence and consequently not sustainable. It is argued that the decree for specific performance is a discretionary relief and both the Courts below have granted such discretionary relief without considering the comparative hardship. It is argued that the defendant and his daughter are residing in the back side of the shop and that he was 70 years of age at the time of execution of the agreement. Therefore, if the relief of specific performance is to be granted, it will non suit the defendant and her daughter from the premises in dispute. Since such fact is not taken into consideration, a decree for specific performance cannot be passed. Reference is made to the judgment of the

Hon'ble Supreme Court reported as ***Parakunnan Veetil Joseph's Versus Nedumbara Kuruvila's son and others, AIR 1987 SC-2328", "Veluyudhan Sathyadas Versus Govindan Dakshyani, 2003 (1) R.C.R. (Civil)-28", "A.C.Arulappan Versus Ahal Ya Naik, (2001) 6 SCC-600"*** and ***"V.Muthusami (dead) by LRs. Versus Angammal and others, (2002) 3 SCC-316".***

Having heard learned counsel for the parties at some length and examining the record of the case, I do not find any merit in the present appeal. No doubt, the learned First Appellate Court has recorded a finding that the defendant has admitted his signatures on the agreement of sale and that he has received earnest money of Rs.51,000/-. Though the defendant has not admitted the execution of the agreement and the receipt of the amount in unequivocal words, but the findings of the execution of the agreement and receipt of earnest money are required to be examined in the the fact and the evidence led. In the written statement, the defendant has denied the execution of the agreement of sale and alleged that the same is a result of fraud and misrepresentation. However, the defendant has not given any particulars of fraud and misrepresentation as required by Order 6 Rule 4 of the Code of Civil Procedure. The defendant has not set up any counter version in the written statement. It was not the stand of the defendant that his signatures were obtained under the guise of the agreement for the increase of rent, as stated in the evidence. It was only in evidence appearing as DW-1, the defendant came up with a plea that his signatures were obtained by the plaintiff under the guise of agreement for the increase of rent. Such was not the fact pleaded in the written statement. In the absence

of any stand in the written statement, the evidence, so led, is an after thought. Still further, a perusal of the agreement Exhibit P-3 shows that the signatures of the defendant are at two places i.e. on the first page as well as on the second page of the document. The manner in which the signatures appear, shows that the signatures were obtained on the document after scribing the same. Therefore, I do not find any merit in the argument raised by learned counsel for the appellant that the signatures of the defendant were taken by the plaintiff by misrepresentation on agreement of sale Exhibit P-3. Therefore, the argument that the finding recorded by the Courts below is based upon misreading of evidence, is of no consequence.

The argument that the plaintiff is not entitled to a decree for specific performance in view of the comparative hardship suffered by the appellant, is again not tenable. The defendant has denied even the execution of the agreement. There is no pleading in respect of hardship in the written statement. It is for the defendant to plead and prove the circumstance to decline the relief of specific performance in terms of Section 20 (2) of the Specific Relief Act, 1963. Though it is well settled that the jurisdiction to grant decree of specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary and is based upon judicial principles. The hardship is a question of fact. The escalation of price of the real estate, Reference *Govind Ram Versus Gian Chand, (2000) 7 SCC-548,* inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, Reference *'K.Narendra Versus Riviera Apartments P. Ltd., 1999 (5) SCC-77' and 'Sargunam (Dead) by*

LRs. Versus Chidambaram, 2004 (4) RCR (Civil)-721', have not been considered as sufficient grounds to decline the decree for the specific performance of the agreement.

In view of the above principles, there is no reason on record on the basis of which it can be held that grant of decree for specific performance should be refused to the plaintiff, moreso when such argument based on fact has been raised in second appeal for the first time.

In view of the above, I do not find any illegality or irregularity in the finding recorded by the Courts below which may give rise to any substantial question of law for consideration of this Court in second appeal. Consequently, the present appeal is dismissed.

03-12-2007 **(HEMANT GUPTA)**
mohinder* **JUDGE